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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1969

NO. 1571

ANDERSON FEDERATION OF TEACHERS, LOCAL 519,

Petitioner,

v.

SCHOOL CITY OF ANDERSON, A. George Harrison, C. Devar Litten, Evelyn J. Byrum, Fred L. Matthews, John L. Childes, as members of the Board of Education of the School City of Anderson, Madison County, Indiana,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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Petitioner, Anderson Federation of Teachers, Local 519, hereby respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Indiana entered in this proceeding on October 1, 1969 and January 19, 1970.

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Indiana are reported at 251 N.E.2d 15. The majority and dissenting opinions of the Supreme Court of Indiana on denial of petition for rehearing are reported at 254 N.E.2d 329.

JURISDICTION

The judgment of the Supreme Court of Indiana, affirming an order of the Superior Court of Madison County, was entered on October 1, 1969. Petitioner filed a petition for rehearing on October 21, 1969. Rehearing was denied with written opinions on January 19, 1970. On April 7, 1970, Mr. Justice Marshall granted petition for extension of time to and including May 15, 1970, to file a petition for writ of certiorari. This court's jurisdiction is invoked under 28 U.S. Code § 1257(3).

QUESTIONS PRESENTED

1. Does an order enjoining public school teachers from striking and picketing, entered without notice or hearing, and without a finding of possible substantial and irreparable injury or interference with the public health, safety or welfare, violate the due process clause of the Fourteenth Amendment?

2. Is an injunction, entered without notice and hearing, enjoining all concerted work stoppages, picketing and related activities by public school teachers solely because they are public employees, violative of the equal protection clause of the fourteenth amendment, where under similar circumstances private employes could not be enjoined?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

While the issues presented to this Court do not depend upon interpretation of any statute, consideration of the constitutional questions presented may require reference to the Indiana anti-injunction statute, Indiana Acts of 1933, Chapter 12, (Burns' Indiana Statutes §§ 40-501 to 40-514), considered by the Supreme Court of Indiana in its decision. Pertinent excerpts from that statute are set forth in the appendix, pp. B-1—B-7.

The United States Constitution, Amendment Fourteen, Section 1, provides in part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On May 2, 1968 the Respondent School City of Anderson filed a complaint in the Superior Court of Madison County, Indiana, against the Petitioner, Anderson Federation of Teachers, Local 519, and two of its officers, in which it alleged that the Federation had caused and carried into effect a strike for collective bargaining purposes for the following school year. The complaint asked for a declaratory judgment that the Federation has no right to apply sanctions, including a strike, against the School City of Anderson, a public authority, and further requested a preliminary injunction without notice. R. 2-8. On the same day the court, ex parte and without notice, entered an order restraining the Federation and all its members inter alia from "calling or continuing any strike against the plaintiff or stating that the employees are on

strike; picketing in front of or in the immediate vicinity" of school buildings. A hearing on the petition for preliminary injunction was set for June 7, 1968. R. 10-12.

On May 3, 1968, the day after the entry, the president of the Board of Education filed an affidavit for a contempt citation, alleging that the Federation and its officers and members had continued to strike and picket schools in the city with knowledge of the restraining order. The court then issued an order to show cause setting hearing on the contempt citation for 3:00 p.m. the same day. R. 14-22.

On May 6, 1968, the hearing having been continued to that date, the court heard evidence on the contempt citation. Numerous procedural motions on behalf of the Federation were overruled. The court found that the Indiana anti-injunction statute was inapplicable where the employer is the sovereign, dismissed contempt citations against individual defendants and found the Federation in contempt of court. R. 35-37.

The Federation filed a motion for new trial (R. 43-45) which was overruled and appeal was taken to the Supreme Court of Indiana.

HOW FEDERAL QUESTIONS WERE PRESENTED

In its brief on appeal to the Supreme Court of Indiana the Federation argued that the various rulings and the contempt judgment of the trial court were erroneous because the Indiana anti-injunction statute applied to the complaint filed by the School City of Anderson. It was also argued that the action was for criminal contempt and the required procedures in such a case were not followed. The Supreme Court of Indiana, without pass-

ing on the alleged procedural irregularities, affirmed the ruling of the trial court holding that the Indiana anti-injunction statute is inapplicable to disputes concerning public employees and that any strike by public employees is absolutely illegal and can be properly enjoined without requiring any further showing. The Indiana Supreme Court relied on the decision of this Court in *United States v. United Mine Workers,* 330 U.S. 258 (1947) as well as various state court decisions. The dissent argued 1) that the anti-injunction statute is applicable to labor disputes involving public employees 2) that no rational distinction could be made between public and private employees simply in terms of the legal status of the employer, where no showing was made that any violence or disruption of public service was threatened, 3) that public employees have a constitutional right to be free from invidious discrimination as a price of their employment, and 4) that a per se rule prohibiting strikes by public employees violates the equal protection clause of the fourteenth amendment. 251 N.E.2d at p. 21.

In its petition for rehearing the Federation argued that the court for the first time declared the public policy of the state in the absence of any statute is to prohibit strikes by public employees under all circumstances. The Federation said this question was not argued on appeal, and that such determination constituted a denial to the Federation and its members of due process of law and equal protection of the laws under the fourteenth amendment to the Constitution of the United States. In the opinion denying rehearing, the court simply stated that such a public policy against strikes by public employees for any purpose is a part of the common law imported from England.

The question was thus timely presented to the state court. *Brinkerhoff-Faris Trust Co. v. Hill,* 281 U.S. 673 (1930). See also Stern and Gressman, *Supreme Court Practice* (4th Ed. 1969), p. 125.

REASONS FOR GRANTING THE WRIT

1. The decision of the Supreme Court of Indiana presents a significant and recurring question of national importance, which has never been passed upon by this Court. That issue is whether public employee organizations may, consistent with the due process clause of the Fourteenth Amendment, be prohibited from exercising rights guaranteed to other employee organizations without any showing of substantial interference with the public welfare.

As pointed out by Judge DeBruler in his dissenting opinion in the court below, the activities of the petitioner which were enjoined by the court ex parte and without notice and hearing were completely peaceful, did not result in closing of the schools and did not substantially disrupt the continuance of the education programs of the School City of Anderson. The Supreme Court of Indiana nevertheless upheld the action of the lower court in enjoining all such concerted activities, including peaceful picketing. The majority held that any such activity when engaged in by employees of a public agency is per se illegal and therefore subject to immediate injunction and consequent contempt proceedings for any violation of such an ex parte order.

This Court has never considered whether the due process clause of the Fourteenth Amendment requires some finding of interference with the public health, safety or welfare, or with some essential governmental activity, as a necessary consequence of the particular work stoppage or other concerted activity, before a blanket injunction of the type entered here can properly be issued.

The treatment of labor relations of public employees is a matter of increasing national importance. The Federation respectfully suggests that it is time for this Court to consider whether there is any logical justification for a rule under which all the usual types of coercive activities, when engaged in by public employee organiations to improve their working conditions, are per se illegal without regard to the effect of those activities upon others.

It should be emphasized that the issues presented to the Court by this case do not include the constitutionality of any state or federal statute dealing with the resolution of labor disputes, or prohibiting strikes, by public employees. Indiana has no such statute, nor has its Legislature declared any public policy in regard thereto.

Nor is the Federation asking the Court to hold that strikes by any public employees, under all circumstances, are constitutionally protected activities. The effect on the public welfare of a strike by teachers would be entirely different from the effect of similar activities conducted by policemen, firemen, garbage collectors, postmen or air traffic controllers, and no extended argument is required to recognize such obvious difference. The effect of particular activities may depend also in large part on the length of time over which such activities are conducted, in relation to the particular services affected. Yet

the per se rule of illegality, adopted without rationale by the Supreme Court of Indiana, requires the courts to close their eyes to all such distinctions and to apply arbitrary standards based solely on the status of the employer as a public agency or publicly owned organization.

The national significance of the problem is pointed out by the various rationales of the state courts, pro and con.[1]

Moreover, there has been a steady trend toward recognition of a constitutional right of public employees to join unions to represent their interests in improving working conditions.[2]

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[1] *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W. 2d 539, 545 (1947) (exercise of non-delegable legislative powers); *City of Los Angeles v. Los Angeles Bldg. and C. Tr. Council*, 94 Cal. App. 2d 36, 210 P. 2d 305, 311-312 (1949) (authority of public body to contract); *City of Detroit v. Division 26 of Amalgamated Ass'n*, 322 Mich. 237, 51 N.W. 2d 228, 233 (1952), Appeal dismissed, 344 U.S. 805 (effective administration of public affairs); *City of Manchester v. Manchester Teachers Guild*, 100 N.H. 507, 131 A. 2d 59, 61 (1957) (interruption of public functions); *Norwalk Teachers Ass'n v. Board of Education*, 138 Conn. 269, 83 A. 2d 482, 31 A.L.R. 2d 1133 (1951) (sovereignty of government); *City of Pawtucket v. Pawtucket Teachers Alliance*, 87 R.I. 364, 141 A.2d 624, 628 (1958) (sovereignty of government); *City of New York v. DeLury*, 23 N.Y.2d 175, 243 N.E.2d 128 (1968) (representatives' right to make budget allocations); cf. *Local 266, etc. v. Salt River Project Agr. Imp. & P. Dist.*, 78 Ariz. 30, 275 P.2d 393 (1954); *Los Angeles Metropolitan Tr. Auth. v. Brotherhood of R. Train*, 54 Cal. 2d 684, 355 P.2d 905 (1960); *School District for City of Holland v. Educ. Assn.*, 380 Mich. 314, 157 N.W.2d 206, 210 (1968).

[2] *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir 1968) (teachers); *American Federation of State, Co. and Mun. Emp. v. Woodward*, 406 F.2d 137 (8th Cir. 1969) (city street department employees); *Atkins v. City of Charlotte*, 296 F.Supp. 1068 (W.D.N.C. 1969) (firemen).

This Court has held that teachers have a right to join organizations without the approval of their employer, *Shelton v. Tucker,* 364 U.S. 479 (1960), and that public employees, although having no right to continued employment, may not be dismissed for engaging in activities constitutionally protected as to other citizens. *Pickering v. Board of Education,* 391 U.S. 563 (1968); *Keyishian v. Board of Regents,* 385 U.S. 589 (1967).

A fresh examination of the constitutional validity of the per se illegality rule, and the possible adoption of a more discriminating approach recognizing the differences among different types of public employment and different impasse situations, is a necessary prerequisite to the development of intelligent and sophisticated legislation dealing with this difficult subject.

2. The decision of the Supreme Court of Indiana further presents the question whether there is any rational basis, consistent with the equal protection clause of the Federal Constitution, for a rule prohibiting strikes by public employees where similar activities by private employees engaged in substantially the same kind of employment are constitutionally protected.

Indiana has a legislatively declared public policy protecting the rights of individual workers to organize and designate representatives, and to negotiate terms and conditions of employment (Burns' Ind. Stats. § 40-502). Pursuant to this policy Indiana courts are prohibited from enjoining concerted work stoppages except under narrowly defined conditions.

Long before passage of this statute the right to engage in combined work stoppages and to use peaceful and lawful means to induce others to refuse employment was established judicially under the common law. *Karges Furni-*

ture Co. v. Amalgamated etc. Union, 165 Ind. 421, 428-431, 75 N.E. 877 (1905). The same rights of organied labor, recognized and protected under the National Labor Relations Act, were recognized by this Court as protected at common law. *American Steel Foundries v. Tri-City C. T. Council*, 257 U.S. 184, 209 (1921). See also *Dorchy v. Kansas*, 272 U.S. 306 (1926).

An increasing number of states have passed more or less comprehensive statutes providing special procedures and rights applicable to unionization and collective bargaining by public employees in different categories.[3] It has also been said that at least 20 states have statutes banning strikes by some or all public employees.[4]

Indiana has no statute dealing with public employee strikes as a separate category, or providing a system of collective bargaining for public employees of any type. In this context the dissenting judges of the Supreme Court of Indiana pointed out that no rational basis has been suggested for a rule prohibiting all strikes by public employees per se, where the impact upon the community is no greater than the impact of strikes involving private employers providing similar services. In the latter case an injunction without notice and hearing is prohibited both by statute and at common law.

This Court should consider whether there is any rational basis, consistent with the equal protection clause, for a rule under which picketing by teachers employed by the School City of Anderson may be enjoined without

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[3] See Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 Mich. L. Rev. 891, 892 n. 5 (1969).

[4] *City of New York v. DeLury*, 23 N.Y.2d 175, 243 N.E.2d 128, 131 (1968).

notice and hearing, while picketing by parochial school teachers in the same city could not be so enjoined, or under which employees of privately owned utilities having exclusive franchises to provide electric power and water to a municipality may strike and picket with impunity, whereas employees of a gas company in the same city which is beneficially owned by the city[5] are prohibited from engaging in the same kind of concerted activities.

The employees involved, when faced with these substantial differences in their legal rights as compared to those of their fellow employees, perhaps can be forgiven for failing to understand such abstruse distinctions, since they have not been steeped in the hoary tradition that the King can do no wrong.

3. The decision below raises questions concerning the proper interpretation and scope of the opinion of this Court in *United States v. United Mine Workers*, which should be reviewed and clarified.

The majority opinion of the court below cites the opinion of this Court in *United States v. United Mine Workers*, 330 U.S. 258 (1947) as the authority on the question whether or not the anti-injunction statute, or "Little Norris-LaGuardia Act", applies to public employees. In the *United Mine Workers* case this Court was faced with the same question of interpretation in regard to the comparable federal statute and decided by a vote of five to four that the Norris-LaGuardia Act, 29 U.S.C. § 101 et seq., is not applicable to employees of the Federal Government.

However, the holding of the Supreme Court of Indiana went beyond the question of statutory interpretation, stat-

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[5] See Burns' Ind. Stats. § 48-7101.

ing that in *United Mine Workers* "the Supreme Court of the United States clearly enunciated the proposition that public employees did not have the right to strike and that the injunctive processes might properly be used to prevent or halt such strikes" (251 N.E.2d at p. 16). This constitutes an unduly broad reading of the *United Mine Workers* decision. This Court did not there purport to rule on the substantive rights of public employees to engage in concerted union activities. The situation which gave rise to the *United Mine Workers* decision was in no way comparable to the situation in the present case or to most other contemporary public employee work stoppages.

United Mine Workers concerned a labor dispute in connection with the operation of the nation's bitumimous coal mines, which had resulted in the seizure of the mines by executive order of the President acting under powers conferred on him by the War Labor Disputes Act, 57 Stat. 163. The President by executive order determined that the continued operation of the coal mines was necessary for the war effort and indispensable for operation of the national economy during the transition from war to peace, and that interruptions in production of the mines would impede or delay the war effort. See 330 U.S. at p. 289, quoting from Executive Order 9728 of May 21, 1946.

When the strike began and the United States obtained the temporary restraining order, for the violation of which the union was convicted of contempt, this Court in affirming the order ruled only that the District Court was not deprived of jurisdiction to restrain the strike by the Norris-LaGuardia Act, and that the union properly could be convicted of contempt for violation of the order. The Court did not rule that under no circumstances could the coal miners, or any more conventional type of Govern-

ment employee, engage in a strike or work stoppage simply because their wages were paid by the Government.

The present case does not involve any showing of either national or local emergency, nor exercise of extraordinary executive powers such as those granted under the War Labor Disputes Act involved in the *United Mine Workers* case. Nevertheless the *United Mine Workers* decision has been relied on as authority for the proposition that under no circumstances may activities of the type here enjoined be engaged in by public employees of any kind. This Court should consider whether the ruling of the Supreme Court of Indiana is a correct interpretation and application of the decision of this Court in *United States v. United Mine Workers.*

CONCLUSION

The Federation submits that it is time this Court examined the rationale underlying the special prohibitions applicable to public employees solely because of the form of ownership of their employer's business, and determine whether there is any constitutional justification for the per se rule established by the decision below.

A writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Indiana.

Respectfully submitted,

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APPENDIX
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APPENDIX A

Opinions of the Supreme Court of Indiana

ANDERSON FEDERATION OF TEACHERS, LOCAL 519,

Appellant,

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SCHOOL CITY OF ANDERSON, A. George Harrison, C. Devar Litten, Evelyn J. Byrum, Fred L. Matthews, John L. Childes, as Members of the Board of Education of the School City of Anderson, Madison County, Indiana, State of Indiana,

Appellees.

NO. 868 S 121

SUPREME COURT OF INDIANA

Oct. 1, 1969

APPEAL FROM THE SUPERIOR COURT OF MADISON COUNTY

Hon. Fred G. Yelton, Jr., Judge

GIVAN, Judge.

On May 6, 1968, the Superior Court of Madison County found the appellant, Anderson Federation of Teachers, Local 519, in contempt of court for the violation of a restraining order which had been issued without notice on the 2nd day of May, 1968, directing the appellant, teachers' union, and its members to refrain from picketing and

striking against the appellee school corporation. It is from this judgment of contempt that this appeal is taken.

The appellant is an organization of public school teachers employed by the appellee.

The appellee is a municipal corporation organized under the statutes of this state for the purpose of operating the public schools within the boundaries of the School City of Anderson, Indiana.

In the spring of 1968 the appellant and the appellees entered into negotiations concerning salary schedules for the following year. These negotiations apparently were not satisfactory to the appellant for on May 1, 1968, the appellant instituted a strike against the school corporation and established picket lines at the various schools operated by appellee. Evidence discloses that school children were unloaded in the public streets because of the presence of the picket lines. It was this action of picketing by the appellant which precipitated the temporary restraining order issued on May 2, 1968, and it was the continuation of this activity without regard for the restraining order upon which the trial court based its judgment after a hearing on May 6, 1968, that the appellant was in contempt of court for violating the restraining order.

[1] The trial court was in all things correct in its finding and judgment of contempt of court.

[2] It is the contention of the appellant that Indiana's "Little Norris-LaGuardia Act," also known as the anti-injunction statute, the same being Burns' Ind.Stat. Ann. §40-501 et seq., is applicable in this case. This act prohibits the issuance of restraining orders and injunctions in matters involving labor disputes between unions and private employers. We do not agree with the appellant that this

act is applicable to disputes concerning public employees. The overwhelming weight of authority in the United States is that government employees may not engage in a strike for any purpose.

The Supreme Court of the United States clearly enunciated the proposition that public employees did not have a right to strike and that the injunctive processes might properly be used to prevent or halt such strikes in the case of *United States v. United Mine Workers* (1947), 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884. This case has never been overruled or modified. The decision was later followed by Justice Goldsborough of the United States District Court for the District of Columbia in the case of *United States v. Brotherhood of Locomotive Engineers* (1948), 79 F.Supp. 485, certiorari denied 335 U.S. 867, 69 S.Ct. 137, 93 L.Ed. 412.

In the *United Mine Workers* case it was contended that the specifications in Section 13 of the statute are in general terms and make no express exception of the United States, thus it was argued the restraining order and injunction were forbidden by the act and wrongfully issued. In dealing with this argument the Supreme Court of the United States, beginning 330 U.S. at page 272, 67 S.Ct. at page 686 of the official opinion, stated:

> "* * * There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect. It has been stated, in cases in which there were extraneous and affirmative reasons for believing that the sovereign should also be deemed subject to a restrictive statute, that this rule was a rule of construction only. Though that may be true, the rule has been invoked successfully in cases so closely similar to the present one, and the statement of the rule in those cases has been

> so explicit, that we are inclined to give it much weight here. Congress was not ignorant of the rule which those cases reiterated; and, with knowledge of that rule, Congress would not, in writing the Norris-LaGuardia Act, omit to use 'clear and specific [language] to that effect' if it actually intended to reach the Government in all cases."

The Court, however, did not rely entirely upon the above proposition, but, in addition, went on to observe as follows:

> "But we need not place entire reliance in this exclusionary rule. Section 2, [29 U.S.C.A. § 102, 9 FCA title 29, § 102,] which declared the public policy of the United States as a guide to the Act's interpretation, carries indications as to the scope of the Act. It predicates the purpose of the Act on the contrast between the position of the 'individual unorganized worker' and that of the 'owners of property' who have been permitted to 'organize in the corporate and other forms of ownership association,' and on the consequent helplessness of the worker 'to exercise actual liberty of contract * * * and thereby to obtain acceptable terms and conditions of employment.' The purpose of the Act is said to be to contribute to the worker's 'full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives * * * for the purpose of collective bargaining * * *.' These considerations, on their face, obviously do not apply to the Government as an employer or to relations between the Government and its employees."

We are in total accord with the above language and hold that it is equally applicable to the Indiana statute.

This same proposition has been followed generally in most of the other state jurisdictions where it has been repeatedly held that strikes by public employees are or should be prohibited and that injunctions should be granted to halt or prevent them. For reference see the following cases:

School Committee of City of Pawtucket v. Pawtucket Teachers Alliance (1966), 101 R.I. 243, 221 A.2d 806;

Minneapolis Federation of Teachers Local 59, AFL-CIO v. Obermeyer et al. (1966), 275 Minn. 347, 147 N.W.2d 358;

City of Minot v. General Drivers and Helpers Union (1966), N.D., 142 N.W.2d 612;

Board of Education of Community Unit School District No. 2. v. Redding (1965), 32 Ill.2d 567, 207 N.E.2d 427;

New Jersey Turnpike Authority v. American Federation et al (1964), 83 N.J.Super. 389, 200 A.2d 134;

Donevero v. Jersey City Incinerator Authority (1962), 75 N.J.Super. 217 182 A.2d 596;

South Atlantic & Gulf Coast District of International Longshoremen's Association, Indedent v. Harris County (1962), Tex.Civ.App., 358 S.W.2d 658;

Hansen v. Commonwealth (1962), 344 Mass. 214, 181 N.E.2d 843;

Port of Seattle v. Int'l Longshoremen's and Warehousemen's Union (1958), 52 Wash.2d 317, 324 P.2d 1099;

City of Pawtucket v. Pawtucket Teachers Alliance (1958), 87 R.I. 364, 141 A.2d 624;

City of Manchester v. Manchester Teachers Guild (1957), 100 N.H. 507, 131 A.2d 59;

City of Alcoa v. Int'l Brotherhood of Electrical Workers (1957), 203 Tenn. 12, 308 S.W.2d 476;

International Brotherhood of Electrical Workers v. Grand River Dam Authority (1956), Okl., 292 P.2d 1018;

City of Detroit v. Division 26 et al. (1952), 332 Mich. 237, 51 N.W.2d 228;

Norwalk Teachers Association v. Board of Education (1951), 138 Conn. 269, 83 A.2d 482, 31 A.L.R.2d 1133;

City of Los Angeles v. Los Angeles Building & Construction Trades Council (1949), 94 Cal. App.2d 36, 210 P.2d 305;

Miami Waterworks Local No. 654 v. City of Miami (1946), 157 Fla. 445, 26 So.2d 194, 165 A.L.R. 967.

We find only one case where an injunction to prevent a pending strike of public employees was denied. That case was *Board of Education of City of Minneapolis v. Public School Employees Union* (1951), 233 Minn. 141, 45 N.W.2d 797, 29 A.L.R.2d 424. That case, however was overruled in 1966 by the Supreme Court of Minnesota in *Minneapolis Federation of Teachers Local 59, AFL-CIO v. Obermeyer, supra.*

The Indiana Continuing Legal Education Forum in 1968 circulated a publication entitled MUNICIPAL EMPLOYEE NEGOTIATIONS AND STRIKES in which they point out that almost without exception the state and federal courts hold that strikes by public employees are illegal.

The publication also quotes from a letter written by President Franklin D. Roosevelt to the President of the National Federation of Federal Employees on August 16, 1937, in which he said:

> "Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of Government employees * * * A strike of public employees manifests nothing less than intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable."

In a New York Supreme Court case Justice Emilio Nunez in granting an injunction against striking teachers made the following observation:

> "Upon the signing of the Condon-Wadlin Act, Governor Dewey stated, in part, that 'Every liberty enjoyed in this nation exists because it is protected by a government which functions uninterruptedly. The paralysis of any portion of government could quickly lead to the paralysis of all society. Paralysis of government is anarchy and in anarchy liberties become useless.'" *Board of Education of the City of New York v. Shanker and United Federation of Teachers, Local 2*, Supreme Court (1967), 54 Misc.2d 941, 283 N.Y.S.2d 548, 552.

We thus see that both the federal and state jurisdictions and men both liberal and conservative in their political philosophies have uniformly recognized that to allow a strike by public employees is not merely a matter of choice of political philosophies, but is a thing which cannot and must not be permitted if the orderly function of our society is to be preserved. This is not a matter for debate in the political arena for it appears fundamental,

as stated by Governor Dewey, public strikes would lead to anarchy, and, as stated by President Roosevelt, the public strike "is unthinkable and intolerable."

The Madison Superior Court, is, therefore, in all things affirmed.

ARTERBURN, J., concurs.

HUNTER, J., concurs with statement.

DeBRULER, C. J., dissents with opinion in which JACKSON, J., concurs.

HUNTER, Judge (concurring).

Heretofore I announced my determination not to participate in this case by reason of the fact that the issues presented involved litigation in the City of Anderson, Indiana, my place of residence. However, my sense of judicial responsibility and duty now impels me to do so, because of the gravity of the legal issues of public policy in the area of public education.

Therefore I wholeheartedly concur in the opinion of Judge GIVAN in this case.

DeBRULER, Chief Justice (dissenting).

I dissent from the opinion of the majority for two reasons:

I. The majority opinion offers absolutely no justification for its holding that every strike by any public employees, including teachers, is illegal and, therefore, enjoinable regardless of how peaceful and nondisruptive the strike is.

II. Indiana has an anti-injunction statute which is applicable to this case. Since the trial court did not follow

the procedures required by that statute, it had no jurisdiction to issue a temporary restraining order or injunction without notice or hearing, or to find the teachers union guilty of contempt without a jury trial.

I.

This teachers' strike was completely peaceful and minimally disruptive of the public service rendered by the schools. Only a small percentage of the public school teachers participated in the strike, the schools were never closed by the strike, and there was sufficient staff to insure that the classes were quiet, seated and at work. The picketing which accompanied this strike was at all times peaceful, non-threatening, and at no time endangered the health or safety of the school or the community. The non-striking teachers and students entered and left the building freely.

In spite of this the majority labels this strike "illegal" and states that, therefore, the injunctive process may be used to halt it. The strike is called illegal because it is in violation of an alleged public policy of this State against all strikes by public employees. However, there has never been such a public policy in this State and there was none in May, 1968, when the teachers in this case went on strike. Our General Assembly has never declared such a public policy, on the contrary, the only legislation that can be interpreted to cover this subject is the anti-injunction statute discussed under Part II of this dissenting opinion, which runs directly counter to the majority opinion.

In the absence of any legislative guidelines, formulated after thorough public discussion and debate, the majority suddenly declares that there is an absolute prohibition

against any strike by any group of public employees, no matter how peaceful or non-disruptive the strike may be.

The majority offers no *argument* to show why this Court should make such a declaration of policy. They merely set out a list of cases from other jurisdictions and quotes from two well-known politicians to the effect that *they* believed strikes by public employees were unthinkable and led to anarchy. Nowhere does the Court descend from these useless generalities and deal with the facts in the case before us.

The court decisions cited by the majority from other jurisdictions are not authority in Indiana except to the extent the reasoning therein is persuasive to this Court. The pertinent cases are those where, in the absence of any legislation, the appellate courts have declared the right to enjoin strikes by public employees, even though the strike is peaceful and minimally disruptive to the general community. I have read all the cases cited by the majority, and on this point I have found none whose reasoning supports a *per se* rule against strikes by public employees. All of the cases rely on the same arguments, and I will examine the main ones to show their weaknesses.

(1) "The terms of employment are not subject to bargaining and strike pressure because they are set by the legislative body and are not within the discretion of the agency which is the employer."

This assumes an old-fashioned, out-dated view of the purpose and value of collective bargaining. In Indiana the governing boards of the school corporations have a wide discretion in the allocation of the resources which are budgeted to them. In the case now before us, the appellee has bargained with appellate over salary schedules at

least since 1952. Besides, there are many issues about which employees are anxious to bargain other than wages, which are within the discretion of the agency employer. This is shown by a policy statement by appellee, in effect prior to and during the strike which reads in part as follows:

> "Be it resolved, that the Board of School Trustees of the School City of Anderson will professionally negotiate with the Anderson Federation of Teachers with regards to employment salary schedules, grievance procedures, working conditions and administration policies."

All employees have a legitimate interest in establishing fair grievance procedures to control arbitrary and discriminatory dismissal or discipline. Teachers especially, as professionals, have a wide range of concerns other than purely monetary. They do and ought to have a strong interest in the establishment of the priorities in the allocation of the total school budget; they are interested in the details of the teacher transfer programs designed to promote integrated faculties; they are interested in the emphasis and techniques to be used in furnishing special services to underprivileged and ghetto children; they have an interest in controlling how much of their time must be given up to patrolling rest rooms searching out smokers, or collecting tickets at basketball games; they have an interest in the quality of texts and audio-visual materials to be used; they have an interest in the whole question of the substitute teacher system. The local governing boards do have discretion in these areas in addition to wide discretion with reference to salaries, job classification, job requirements, etc. The existence of this discretion means that there is something for teachers and local school

boards to bargain about. It also means that there is a wide scope for arbitrary and unfair actions by those boards which can be avoided only if the teachers have the effective means to pressure the boards into good faith bargaining on the issue. If this argument against the right of all public employees to strike ever held water, it certainly does not any longer.

(2) "To say that public employees can strike is to say that they can deny the authority of government."

It must be kept in mind that the local governing boards of school corporations have a great deal of *discretion* over the terms and conditions of employment of teachers. Any decision within this discretionary area is authorized by the government and, therefore, obviously does not deny the authority of government. The teachers seek to compel choices within that discretionary area. They do *not* seek to destroy the body politic or pressure employers into violating their statutory duties.

In addition, I think the entire community benefits when the government recognizes the right in its employees and citizens to compel the human agents of that government to behave reasonably and fairly towards all those with whom they deal.

(3) "A strike by public employees is a strike against government itself, a situation so anomalous as to be unthinkable."

This is not a rational argument at all but a technique for avoiding dealing with the merits of the issue. This argument indicates a limitation in the thinker not attributable to the subject matter. In the case of a peaceful strike and no major disruption of the community, I find it very easy to think of a strike against the sovereign

and to justify it. In fact, I find it unthinkable that any sovereign worthy of the name would strive to remain insulated from all pressures to act fairly and decently, without arbitrariness, towards its employees. The conflict of real social forces cannot be solved by the invocation of magical phrases like "sovereignty".

(4) "Public employees occupy a status entirely different from private employees because they are agents of the government serving a public purpose and a strike by them contravenes the public welfare and results in paralysis of the society."

First, I think we should note the basic similarities between the two categories of employees. They both involve people working for wages and seeking some control over their employment conditions. The potential for arbitrary and discriminatory practices against employees are the same. In both cases there is pressure on the employer to pay as little as possible and still retain the personnel. In both cases the employer has some areas of discretion which allow for bargaining with the employees.

Second, I believe that to avoid being in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution the dichotomy between public and private employees must have a rational basis in light of the purpose of the no-strike prohibition. *Rinaldi v. Yeager* (1966), 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577. If some strikes by workers within the category of public employees would not appreciably disrupt the community or create anarchy, then there is no justification for treating those public employees differently than private employees, and, therefore, no justification for a *per se* rule against strikes by public employees. To justify such a prohibition against every strike by any public employees

the results of a strike by such employees must be different from and more disruptive than a strike by private employees. That such is not the case can be easily demonstrated.

(a) There is no difference in impact on the community between a strike by employees of a public utility and employees of a private utility; nor between employees of a municipal bus company and a privately owned bus company; nor between public school teachers and parochial school teachers. The form of ownership and management of the enterprise does not determine the amount of disruption caused by a strike of the employees of that enterprise. In addition, the form of ownership that is actually employed is often a political and historical accident, subject to future change by political forces. Services that were once rendered by public enterprise may be contracted out to private enterprise, and then by another administration returned to the public sector.

(b) It seems obvious to me that a strike by some private employees would be far more disruptive of the society than the peaceful teachers' strike involved in this case, *e. g.,* the truck drivers who deliver milk to the cities, the factory workers who work in defense plants, construction workers on missile and space launching sites, agricultural workers, etc.

(c) The state and municipal governments perform their many functions through a large number of different agencies of varying importance. The temporary cessation of work in one of those agencies will not *necessarily* interfere with the rest of the service. It is naive to think that *every* strike by *any* public employees will upset the whole operation of government.

Does the majority seriously believe that a strike by employees of municipal golf courses would result in anarchy? What of city parking lot attendants? What about janitors? What about referees at the high school basketball games? In this case there was absolutely no finding that the strike was unduly disrupting the community or causing social chaos.

Neither may the constitutional right of public employees to be free from invidious discrimination by the State be diminished as a price of public employment. In *Garrity v. New Jersey* (1967), 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562, the United States Supreme Court said:

> "We conclude that policemen like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.
>
> "There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price." 385 U.S. at 500, 87 S.Ct. at 620.

In *Keyishian v. Board of Regents of New York* (1967), 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629, that same Court said:

> "However, the Court of Appeals for the Second Circuit correctly said in an earlier state of this case, '* * * the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.' *Keyishian v. Board of Regents,* 2 Cir., 345 F.2d 236, 239. Indeed, that theory was expressly rejected in a series of decisions following Adlers. See *Wieman v. Updegraff,* 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216; *Slochower v. Board of Higher Education,* 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692; *Cramp v. Board of Public Instruction, supra; Baggett v. Bullitt, supra; Shelton v. Tucker, supra; Speiser v. Randall, supra;* see also *Schware v. Board of Bar*

> *Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796, 64 A.L.R.2d 288; *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982. In *Sherbert v. Verner*, 374 U.S. 398, 404, 83 S.Ct. 1790, 10 L.Ed.2d 965, 971, we said: 'It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.' " 385 U.S. at 605, 87 S.Ct. at 685.

It is clear then that the mere existence of some difference between public and private employees cannot justify an absolute strike prohibition.

It is true that a strike by public employees may result in some amount of disruption of the agency for which they work. In the absence of legislation dealing with this subject we believe that it is a judicial function to determine whether the amount of the disruption of the service is so great that it warrants overriding the legitimate interests of the employees in having effective means to insure good faith bargaining by the employer. This is a minimum requirement before a court can declare a strike by public employees illegal.

This view is supported by *School District for City of Holland, Ottawa and Allegan Counties v. Holland Education Association* (1968), 380 Mich. 314, 157 N.W.2d 206. In that case the Supreme Court of Michigan reversed the issuance of an injunction against a teachers' strike on the ground that the only harm shown was that the schools would be closed and would not open the fall term on time. The court said:

> 'We here hold it is insufficient merely to show that a concert of prohibited action by public employees has taken place and that *ipso facto* such a showing justifies injunctive relief. We so hold because it is basically contrary to public policy in this State to issue injunctions in labor disputes absent, a showing of

violence, irreparable injury, or breach of the peace. For a recent discussion of this question, see *Cross Company v. United Automobile, Aircraft & Agricultural Implement Workers of America Local No. 155 (AFL-CIO)*, 371 Mich. 184, 123 N.W.2d 215. We further so hold because such an interpretation of the act would as before noted raise a serious constitutional question.

"We indicated earlier that we deal with a meager record. No testimony was taken on the hearing upon the application for the temporary injunction. Simply put, the only showing made to the chancellor was that if an injunction did not issue, the district's schools would not open staffed by teachers on the date scheduled for such opening. We hold such showing insufficient to have justified the exercise of the plenary power of equity by the force of injunction." 157 N.W. 2d at 210.

In our case there was not even that much harm shown.

I think it is a very unwise policy to allow a trial court to enjoin a peaceful strike, in the absence of any way to insure that the underlying dispute will be discussed and settled amicably. To prohibit a strike in a context where this amounts to ending any pressure on the employer to bargain in good faith with representatives of the employees is to invite arbitrary action by the employer, illegal strikes, violence, and bitter feelings which may do longlasting damage to the community.

Indiana needs a comprehensive labor relations act which would provide a mechanism to help settle labor disputes involving both public and private employees, without recourse to a strike.[1] It is obvious the courts cannot create

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1. Getman, Indiana Labor Relations Law: The Case of a State Labor Relations Act, 42 Ind.L.J. 77 (1966); Whitney, Indiana Labor Relations Law.

this machinery. It is equally obvious that the Court should not create an apparent substitute in the form of a *per se* rule against peaceful strikes by public employees regardless of the impact of the strike, when this substitute is wholly inadequate and seriously misleading as to its effects.

II.

The Indiana anti-injunction statute, Acts of 1933, ch. 12, the same being Burns' Ind. Stat. Ann. §§40-501 to 40-514, sets out procedures which must be followed by a trial court in order to get jurisdiction to enjoin a strike. The statute reads in part:

> "No court of the state of Indiana, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity, with the provisions of this act * * *." Burns' § 40-501
>
> "No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of finding of facts made and filed by the court in the records of the case prior to the issuance of such restraining order or injunction * * *." Burns' § 40-509
>
> "In all cases arising under this act in which a person shall be charged with contempt in a court of the state of Indiana (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and county wherein the contempt shall have been committed * * *." Burns' § 40-511

These and other procedural requirements are applicable if the case is one "involving or growing out of a labor dispute." On the face of it, this statute clearly applies

to this controversy. Appellant is a teachers' union composed of employees of appellee which has regularly bargained with the appellee-employer at least since 1952 over various terms and conditions of their employment. The parties were in the midst of negotiations over the next year's employment contract when the strike occurred. A policy statement by appellee, which was in effect during the period of time involved here, reads in part as follows:

> "Be it resolved, that the Board of School Trustees of the School City of Anderson will professionally negotiate with the Anderson Federation of Teachers with regards to employment, salary schedules, grievance procedures, working conditions and administrative policies."

I can think of no better way to describe this controversy than as a classic labor dispute.

The anti-injunction statute defines a labor dispute as:

> "(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regradless of whether or not the disputants stand in the proximate relation of employer and employee." Burns' § 40-513(c)

Burns' §40-513(a) sets out several ways in which a case will be held to "involve or grow out of a labor dispute", among which are:

> "(a) A case shall be held to involve or grow out of a labor dispute when the case involves persons who are engaged in the same • • • occupation • • • or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dis-

> pute is (1) between one or more employers or association of employers and one or more employees or association of employees * * * or when the case involves any conflicting or competing interests in a 'labor dispute' (as hereinafter defined) of 'persons participating or interested' therein (as hereinafter defined)."

The definitions are in the disjunctive, and, therefore, any one of them, if applicable, would qualify this case as one "involving or growing out of a labor dispute". Obviously they are all applicable.

When we look to common usage and to the definitions in the statute itself, it appears that this controversy is within the anti-injunction statute.

Although there are no cases in Indiana on this point, Indiana has a statute which tells us how to construe this statute. 2 R.S. 1852, ch. 17, §1, the same being Burns' Ind.Stat.Ann. § 1-201 states:

> "Statutes, how construed. — The construction of all statutes of this state shall be by the following rules, unless such construction be plainly repugnant to the intent of the legislature or of the context of the same statute:
>
> "First. Words and phrases shall be taken in their plain, or ordinary and usual, sense. But technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."

When the words in Burns' §40-513, *supra*, are taken in their plain, or ordinary and usual sense, they obviously apply to this controversy. Neither is this construction plainly repugnant to the intent of the Legislature or the context of this statute.

Another statute which leads to this conclusion is 2 R.S. 1852, ch. 17, §2, the same being Burns' Ind.Stat.Ann. §1-202, which states:

> "The foregoing rules of construction and definitions of terms shall be in addition to, and part of those adopted in the Code of Civil Practice, and, together with those, shall apply to all statutes or acts of the legislature."

Indiana Acts of 1881 (Spec. Sess.), ch. 38, §857, the same being Burns' Ind.Stat.Ann. §2-4701, in the Civil Code states in part:

> "In the construction of this act, the following rules shall be observed, when consistent with the context:
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> * * * * *
>
> "[Fifth] The word 'person' extends to bodies politic and corporate."

This means that the word "persons" as used in Burns' § 40-513(a), *supra*, does apply to the state and especially to *school corporations.*

In further support of this position is the following opinion of the Attorney General referring to the anti-injunction statute:

> "The 'employer' in a 'labor dispute' is not defined, and *there is no language which limits the application of the statute or its declared public policy only to employees in private industry.* No consideration is given in the 1944 Opinion to the fact that authorizing the organization of employees while permitting their elected representatives to be totally ignored by a public employer would be an exercise in futility, at best, and *could not have been contemplated by the General Assembly when it enacted that statute in 1933.*" (Emphasis added.) 1966 O.A.G. 151

Thus, I think there is no doubt that the Indiana anti-injunction statute is applicable in this case.

The majority argues that the trial court was correct in holding that the anti-injunction statute did not apply, relying on *United States v. United Mine Workers of America* (1947), 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884.

In that case due to dangerous conditions at home and abroad in 1946, the United States government had by executive order taken over the coal mines and made the miners "public employees". The union threatened to strike, and to avert a national emergency the United States obtained, without notice or hearing, a temporary restraining order against the strike. The union refused to obey the order and was held in contempt of court. On appeal the union argued that the temporary restraining order was invalid because it was not issued in compliance with the federal anti-injunction act, commonly called the Norris-LaGuardia Act. The Supreme Court held that the federal anti-injunction act did not apply to a strike by public employees against the United States.

There are no cases in Indiana construing the Indiana version of the anti-injunction statute where public employees have been involved. Since the federal act was the model for the Indiana statute, the majority deems that case, construing the federal act, controlling in the case before us.

A federal case construing a federal statute is, of course, not binding authority on any state. As was shown above, the Indiana statutes on construction clearly make the Indiana anti-injunction statute applicable to this strike by public school teachers. With all due deference to the United States Supreme Court, I do not find the reasoning of that

case persuasive enough to cause us to deny the clear applicability of the Indiana anti-injunction statute. There are several reasons for this.

(1) In United States v. United Mine Workers of America, supra, the Supreme Court relied largely on a rule of statutory construction which the court stated as follows:

> "There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect." 330 U.S. at 272, 67 S.Ct. at 686.

Indiana has no such general rule of construction to be followed in all cases and the majority cites no Indiana cases on this point. The statutes setting out the rules of construction discussed above do not contain such a rule and in fact show a contrary intent.

In *United States v. California* (1936), 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567, the Supreme Court commented on the rule saying:

> "The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated." 297 U.S. at 186, 56 S.Ct. at 425.

I believe the purpose of the Indiana anti-injunction statute is not in doubt, and is fairly inferred by using the statutes on construction cited above, being Burns' §§ 1-201, 1-202, and 2-4701. I can only conclude that the Legislature knew of those statutes and, in passing the anti-injunction statute, intended it to apply to labor disputes involving public employees.

(2) The anti-injunction statute sets out conditions to be fulfilled prior to the enforcement of any right the complainant might have. A statute of this type has been held to bind the State even though it was *not expressly referred to in the statute. Bahr v. Zahm* (1941), 219 Ind. 297, 37 N.E.2d 942. There the Court held that the State was barred from filing a claim against a decedent's estate because it had not been filed within thirty days before final settlement as required by the then existing statute. The State relied on a statute declaring that the statute of limitations would not bind the State. The Court applied the probate statute to the State, in spite of the fact that the statute did not expressly refer to the State, saying:

> "We do not know of any statute or rule of law that relieves the state of Indiana from the obligation to perform conditions precedent upon which the enforcement of a right of action is made to depend." 219 Ind. at 302, 37 N.E.2d at 944.

I believe *Bahr v. Zahm, supra,* applies to this case. The anti-injunction statute sets out conditions precedent to the enforcement of a right of action. As in *Bahr* the sovereign is not expressly mentioned, and as in *Bahr* it does not have to be in order to be bound by it.

(3) The rules of statutory construction relied on by the Supreme Court had the same origin as the doctrine of "sovereign immunity" in tort law; namely, in the relation between the Crown and Parliament in Eighteenth Century England.[2] The rule that in the absence of an express declaration the sovereign is not bound by the laws governing private parties has long been used to defeat government liability for the negligent acts of its employees. This out-

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2. Hargrove v. Town of Cocoa Beach (Fla. 1957), 96 So.2d 130, 60 A.L.R.2d 1193.

moded doctrine has been widely criticized for its unjust results and irrational basis.[3] It has been on the decline in Indiana,[4] and it has been totally abandoned in the case of municipal corporations. *Brinkman v. Indianapolis* (1967), Ind.App., 231 N.E.2d 169. In the *Brinkman* case the Court held that the City of Indianapolis was liable for the negligent acts of its police employees on the theory of *respondeat superior*. The Court discarded the useless distinction between proprietary and governmental functions and relied on the opinions in *City of Louisville v. Chapman* (Ky.1967), 413 S.W.2d 74, and *Hargrove v. Town of Cocoa Beach* (Fla.1957), 96 So.2d 130, 60 A.L.R.2d 1193. Quoting from the latter case the Court said:

> ' "To continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the Twentieth Century upon an Eighteenth Century anachronism." ' 231 N.E.2d at 172.

The reasons for discarding sovereign immunity in tort law are equally valid for discarding sovereign immunity in the area of statutory construction. We cite this as a clear example of the modern trend to apply to the State and its subdivisions the same laws and standards as are applied to private parties. If there is a reason why this should not be done, the Legislature can expressly make the exception.

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3. Davis, Tort Liability of Government Units, 40 Minn.L. Rev. 752 (1956); LeFlar & Kantrowitz, Tort Liability of the States, 29 N.Y.U.L. Rev. 1363 (1954); Note, Governmental Tort Liability in Indiana, 23 Ind.L.J. 468 (1948); Borchard, Government Liability in Tort, 34 Yale L.J. 1, 129, 229 (1924); 36 Yale L.J. 757, 759, 1039 (1926).

4. Note, The Decline of Sovereign Immunity, 36 Ind.L.J. 223 (1961).

(4) The Supreme Court in construing the federal act also relied on the argument that the word "persons" did not apply to the sovereign.

> "Section 13, in the first instance, declares a case to be of this type when it 'involves persons' or 'involves any conflicting or competing interests' in a labor dispute of 'persons' who stand in any one of several defined economic relationships. And 'persons' must be involved on both sides of the case, or the conflicting interests of 'persons' on both sides of the dispute. The Act does not define 'persons'. In common usage that term does not include the sovereign, and statutes employing it will ordinarily not be construed to do so. Congress made express provision, R.S. § 1, 1 U.S.C.A. § 1, [2 FCA title 1, § 1,] for the term to extend to partnerships or corporations, and in § 13 of the Act itself for it to extend to associations. The absence of any comparable provision extending the term to sovereign governments implies that Congress did not desire the term to extend to them." 330 U.S. at 275, 67 S.Ct. at 687.

As we have shown above, this is definitely not the case in Indiana. Burns' §2-4701, *supra,* in the Civil Code states in part:

> "In the construction of this act, the following rules shall be observed, when consistent with the context:
>
> * * * * * *
>
> "[Fifth] The word 'person' extends to bodies politic and corporate."

This is applicable to the anti-injunction statute through Burns' §1-202, *supra:*

> "The foregoing rules of construction and definitions of terms shall be in addition to, and part of those adopted in the Code of Civil Practice, and, together

with those, shall apply to all statutes or acts of the legislature."

On the reasoning of the Supreme Court, since we have a provision extending the term "person" to the sovereign, we can infer that the Legislature *did* desire to include the sovereign in the anti-injunction act.

In the absence of any substantive legislation concerning labor disputes involving public employees, I would hold that the Indiana anti-injunction statute does apply to strikes by public employees.

The application of this statute to strikes by public employees does not strip the state, county, or city officials from keeping the peace, suppressing riots or preventing social chaos. Neither does it mean that the court can never enjoin a strike.[5] It does mean that there are certain *necessary conditions* which must be fulfilled before the Court can determine whether or not a strike is illegal. There is no issue here of whether or not the State may act in self-defense. The statute itself provides for the issuance of a temporary restraining order without notice under certain circumstances.[6] The issue is what is the appropriate role for a court in the area of labor disputes. I would not have it being used as a tool in collective bargaining. I believe that

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5. Roth v. Local Union No. 1460 of Retail Clerks Union (1939), 216 Ind. 363, 24 N.E.2d 280.

6. "Provided, however, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testmony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days." Burns' Ind.Stat.Ann. § 40–507.

until the Legislature acts further, the Court should apply the anti-injunction act in cases of strikes by public employees and not a judicial version of martial law.

JACKSON, J., concurs.

ANDERSON FEDERATION OF TEACHERS, LOCAL 519, *Appellant,* v. SCHOOL CITY OF ANDERSON, A. George Harrison, C. DeVar Litten, Evelyn J. Byrum, Fred L. Matthews, John L. Childes, As Members of the Board of Education of the School City of Anderson, Madison County, Indiana, State of Indiana, *Appellees.*	NO. 868 S 121

SUPREME COURT OF INDIANA

Jan. 19, 1970

ON PETITION FOR REHEARING AND ON PETITION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

GIVAN, Judge.

[1] Appellant's petition for rehearing in this case was filed on October 21, 1969. Thereafter, on the 20th day of November, 1969, Loran W. Robbins and James R. Nolan, who are members of and President and Secretary-Treasurer, respectively, of Teamsters Local Union No. 135 in Indianapolis, filed their petition to file brief as amicus curiae.

This was the first time that said petitioners or anyone similarly situated have sought to intervene as amicus curiae in this appeal. In their petition they seek to raise a new question that the judgment and order against the Anderson Federation of Teachers, Local 519, is a nullity for the reason that said Local is not a separate entity, citing the case of *Local Union No. 135, International Brotherhood of Teamsters, etc. et al. v. Merchandise Warehouse Company* (1956), 127 Ind.App. 57, 63, 64, 132 N.E.2d 715, 718.

Appellees have filed objections to the petition for leave to file brief amicus curiae in which they point out that the established law in Indiana is that a question or issue may not be presented to the Court for the first time on a petition for rehearing, citing *Browne v. Blood* (1964), 245 Ind. 447, 196 N.E.2d 745, 199 N.E.2d 712, rehearing denied 199 N.E.2d 712; *Hardin v. State* (1964), 246 Ind. 23, 201 N.E.2d 333, rehearing denied 202 N.E.2d 164.

It is thus argued that parties seeking to intervene as amicus curiae should not be permitted to so raise a new question for the reason that they are required to accept the case as they find it at the time of their petition to intervene. *City of Indianapolis v. Wynn* (1959), 239 Ind. 567, 157 N.E.2d 828, rehearing denied 239 Ind. 567, 159 N.E.2d 572; *Indiana State Board of Medical Registration v. Seulean* (1942), 219 Ind. 321, 328, 37 N.E.2d 935.

With this we agree, and for that reason we deny the petition to file brief amicus curiae at this time. However, because the question raised casts reflection upon eminent counsel handling the appeal for the Anderson Federation of Teachers, Local 519, in that it suggests they failed to raise a pertinent point in the case, we feel compelled to point out that the case of *Local Union No. 135 v. Merchandise Warehouse Company, supra,* cited by those seeking to

intervene, after recognizing the general principle which is urged by the intervenors, states as follows:

> "An examination of the whole record, however, indicates that this is a suit against a class of individuals too numerous to be brought into court and that the appellants James Burrello, William Schlott, Harry Belmore and Gene San Soucie were sued as the representatives of that class known as Teamsters Local No. 135. The judgment, by its express terms runs against all the members of Teamsters Local No. 135, separately and severally, and against Gene San Soucie, President, James Burrello, William Schlott and Harry Belmore as their agents and representatives. To that extent the judgment is valid."

In the case at bar the restraining order was issued against the "Anderson Federation of Teachers Local 519, and every member thereof, and all persons agreeing, combining, and conspiring with them, their representatives, officers, associates, confederates, employees, agents, representatives and servants, and all persons whomsoever known or unknown to whom notice thereof shall come, • • •." The judgment of contempt was rendered against the Local and fine levied in the sum of $500.00 per day starting with May 3, 1968, and for each school day "• • • said Anderson Federation of Teachers Local 519 and all of its members continued to strike, picket or in any manner interfere with plaintiff's conduct with the public schools of the City of Anderson." It is thus apparent that even by the authority of the very case cited by those seeking to intervene that the judgment rendered in this case is valid for the reason that the restraining order and the judgment include the individual members of the Union.

The fact that counsel for appellant did not raise this question themselves is certainly no reflection on their

ability. It is commendable they did not raise a question which was so obviously not involved in the case.

[2-4] Question is raised by the petition for rehearing that the decision of the Court is erroneous in holding that government employees may not engage in a strike for any purpose in that there is no statute enacted by the General Assembly declaring such to be the public policy of the State of Indiana. The State of Indiana by statute has adopted "the common law of England, and the statutes of the British Parliament made in aid thereof prior to the fourth year of the reign of James the First * * *." Burns' Ind.Stat. §1-101.

The text which we quoted in our opinion from *United States v. United Mine Workers of America* (1947), 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884, is a statement of the common law and thus also expressly a part of the law in the State of Indiana.

As was stated in *United States v. Herron* (1873), 20 Wall. 251, 22 L.Ed. 275, it is a maxim of the common law that "* * * when a statute is general and any prerogative, right, title, or interest would be devested or taken from the King, in such a case he shall not be bound unless the statute is made by express words to extend to him, * * *."

And in speaking of the same proposition, the Supreme Court of the United States in the case of the *Dollar Savings Bank v. U. S.* (1873), 19 Wall. 227, 239, 22 L.Ed. 80, 82, stated:

> "The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him [the King] in the least, if they may tend to restrain or diminish any of his rights and interests."

As pointed out in our original opinion, there is no right of public employees to strike. At the time of the formation of the common law any such activity on the part of those in the service of the king was considered treason. Thus, in the common law state of Indiana the public strike is not lawful.

The anti-injunction statute, a "policy statute," does not apply to the state government or any of its subdivisions and by its very terms and definitions is confined to "labor disputes" in the private sector of the body politic. Any change in this status of the law which might permit any type of public strike can only be accomplished by express "public policy" legislation so stating.

We feel that other matters contained in the petition for rehearing are adequately covered by the original opinion.

Petition to intervene amicus curiae is denied.

Petition for rehearing is denied.

HUNTER, C. J., and ARTERBURN, J., concur.

DeBRULER, J., dissents with opinion in which JACKSON, J., concurs.

DeBRULER, judge (dissenting).

My overall view of this case continues to be that the teachers here involved, like all citizens, have a constitutionally protected right to conduct themselves in any manner that they see fit, so long as they do not act in a manner which violates a reasonable and existing law. My research of the law of Indiana reveals that at the time these teachers peacefully demonstrated the firmness of their demands concerning terms of employment to the school board and community, by stopping work and picket-

ing, there was no law in this State which prohibited such action.

Consequently, in my opinion, the trial court erred, when it judicially determined that a violation of law had occurred. I vote in favor of granting a rehearing in this case.

JACKSON, J., concurs.

APPENDIX B

Excerpts from Indiana Acts 1933, ch. 12; Burns Ind. Stat. Ann. §§ 40-501—40-514.

40-501. Issuance of injunctions restricted.—No court of the state of Indiana, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this act [§§ 40-501—40-514]; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this act. [Acts 1933, ch. 12, § 1, p. 28.]

40-502. Public policy of state declared.—In the interpretation of this act [§§ 40-501—40-514] and in determining the jurisdiction and authority of the courts of the state, as such jurisdiction and authority are herein defined and limited, the public policy of the state is hereby declared as follows:

Whereas, under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership associations, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be

free from interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definition of, and limitations upon, the jurisdiction and authority of the courts of the state of Indiana are hereby enacted. [Acts 1933, ch. 12, § 2, p. 28.]

* * * * *

40-504. Injunctions and restraining orders—When not issued.—No court of the state of Indiana shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section three [§ 40-503] of this act;

(c) Paying or giving to, or withholding from any person participating or interested in such labor dispute, or any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the state of Indiana;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising,

speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section three [§ 40-503] of this act. [Acts 1933, ch. 12, § 4, p. 28.]

40-505. Combination or conspiracy — When injunction not issued for. — No court of the state of Indiana shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitutes or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section four [§ 40-504] of this act. [Acts 1933, ch. 12, § 5, p. 28.]

* * * * *

40-507. Injunctions — Testimony and basis for issuing — Temporary restraining order — Bond. — No court of the state of Indiana shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testi-

mony in opposition thereto, if offered, and except after findings of fact by the court, to the effect;

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief; and

(d) That complainant has no adequate remedy at law;

(e) That the public officer charged with the duty to protect complainant's property are [is] unable or unwilling to furnish adequate protection. Such hearings shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officers of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property; Provided, however, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the

court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five [5] days and shall become void at the expiration of said five [5] days. No temporary restraining order or temporary injunction shall be issued except on conditions that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable cost (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceedings and subsequently denied by the court. * * * [Acts 1933, ch. 12, § 7, p. 28]

40-508. Injunctive relief—When denied.—No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration. [Acts 1933, ch. 12, § 8, p. 28.]

40-509. Injunction — Finding of facts — Limitation on prohibition. — No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of finding of facts made and filed by the court in the records of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such

specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein. [Acts 1933, ch. 12, § 9, p. 28.]

* * * * *

40-513. Definitions of terms. — When used in this act [§§ 40-501—40-514], and for the purpose of this act:

(a) A case shall be held to involve or grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or association of employers and one or more employees or association of employees; (2) between one or more employers or association of employers and one or more employer or association of employers; or (3) between one or more employees or association of employees and one or more employees or association of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined.)

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the state of Indiana" means any court of the state of Indiana whose jurisdiction has been or may be conferred or defined or limited by act of the general assembly of the state of Indiana. [Acts 1933, ch. 12, § 13, p. 28.]

* * * * *

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1969

No. 1571

ANDERSON FEDERATION OF TEACHERS, LOCAL 519,

Petitioner,

v.

SCHOOL CITY OF ANDERSON, A. George Harrison, C. DeVar Litten, Evelyn J. Byrum, Fred L. Matthews, John L. Childes, as members of the Board of Education of the School City of Anderson, Madison County, Indiana,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, School City of Anderson, Indiana, et al, submit that the Petition for Writ of Certiorari filed by Anderson Federation of Teachers, Local 519, should be denied, for the following reasons and authorities:

JURISDICTION

Petitioner's attempt to invoke this Court's jurisdiction under 28 U. S. Code Section 1257(3) is not well-founded.

This case does not concern the validity of any U. S. treaty or statute. It does not directly concern the validity of a state statute (the Indiana Anti-Injunction Statute) on the ground of its being repugnant to the Constitution or other U. S. laws since this question was never presented to either the trial court or the Indiana Supreme Court. Finally, this case does not involve any federal Constitutional or statutory right, privilege or immunity (under the 14th Amendment) since again, this question was never raised by Petitioner either at the trial court or on appeal to the Indiana Supreme Court. Respondents will cover this matter in the Argument.

QUESTIONS PRESENTED

Neither of the two constitutional questions here urged by Petitioners were ever presented to the Superior Court of Madison County or to the Indiana Supreme Court. The matter of whether the trial court had acted without a finding of possible substantial injury or interference with public health, safety and welfare in issuing the restraining order was never raised to the Indiana courts at any time in the proceedings.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

While Petitioners argued that the Indiana Anti-Injunction Statute (Indiana Acts of 1933, Chapter 12; Burns Indiana Annotated Statutes Sec. 40-501 to 40-514) did not apply to strikes by school teachers and other pub-

lic employees at both the trial and appeal stages of this case, they never alleged that the 14th Amendment to the U. S. Constitution would be abridged by refusing to permit teachers to utilize the provisions of said statute in either the trial court or on appeal.

STATEMENT OF THE CASE

Respondents accept Petitioner's statement of the case as substantially correct, but would add the following facts to clarify that statement:

(1) The initial verified complaint for declaratory judgment and restraining order brought by respondents against Petitioner sought a determination, by the trial court, as to the validity of an existing strike or other sanctions by Petitioner's members who then were acting in violation of their individual contracts of employment for the 1967-1968 school year.

(2) Said initial verified complaint alleged an emergency and that irreparable injury would occur, jeopardizing the health, safety and welfare of the pupils in the school district, unless an immediate order be issued restraining the strike and other sanctions being conducted by Petitioner. On the basis of the verified petition, the temporary restraining order was issued on May 2, 1968, but the strike continued in defiance of that order, and a contempt citation against Petitioner was filed May 3, 1968.

(3) At the May 6, 1968 hearing on the contempt citation, 18 witnesses testified on behalf of respondents that a strike was being conducted in contravention to present contracts of employment, that bus drivers were refusing to cross picket lines and were discharging their student passengers in unsafe areas, and that the operation of the

school system was being disrupted. This evidence was uncontroverted and no evidence whatsoever was presented on behalf of Petitioner.

(4) At the conclusion of this evidence and before the Court had entered a finding, Petitioner voluntarily agreed to terminate the strike and comply with the Court's restraining order if the contempt citations against its individual members and officers were dismissed by respondents, leaving to the Court the determination of whether the Petitioner—Federation was in contempt of court. (R. 35-37)

(5) None of the "numerous procedural motions" filed by Petitioner in the trial court raised any federal or constitutional questions here presented.

(6) Thereafter, Petitioner appealed from the finding of contempt of court and during the entire course of appeal to the Indiana Supreme Court never raised any federal or constitutional question. The Petitioner did not raise any federal question until after the Indiana Supreme Court had rendered its decision on October 1, 1969. (251 N.E. 2d 15)

(7) In their petition for rehearing, filed October 19, 1969, Petitioner alleged that the decision denied it and its members due process and equal protection of the laws under the 14th Amendment of the U. S. Constitution, and Article 1, Section 12 of the Indiana Constitution. The Indiana Supreme Court denied rehearing, on January 19, 1970, without discussing these constitutional questions. (254 N.E. 2d 329)

ARGUMENT

1. No substantial federal questions are involved in this case.

Respondents will treat both questions presented by the Petitioner, concerning due process and equal protection under the 14th Amendment, at this point, since the same objections can be raised to each. In doing so, respondents would submit that by this court's rules, no jurisdictional basis exists to permit review of the Indiana Supreme Court's ruling. Petitioner failed to raise these questions before either the trial court or the Indiana Supreme Court, and these questions were neither briefed or argued by the parties, nor considered by the Indiana Supreme Court in its judgment. In Indiana, constitutional questions cannot be raised for the first time on appeal. *Williams v. Williams,* 217 Ind. 581, 29 N.E. 2d 557 (1940).

Petitioner seeks review of a judgment of the Indiana Supreme Court which affirmed the trial court's finding that Petitioner was guilty of contempt for violating a temporary restraining order. The rationale of the majority's ruling was that (1) the trial court was correct in finding the Petitioner in contempt and (2) that, contrary to Petitioner's contention, restraining orders may be issued against public employees, without notice, because Indiana's "Little Norris-LaGuardia Act", which prohibits such issuance, does not apply to disputes concerning public employees. (A-2) The majority relied upon *United States v. United Mine Workers,* 330 U.S. 258 (1947) and decisions from 16 other jurisdictions following the authority of that landmark case in deciding the above matters and in ruling that public employees do not have the right to strike.

A lengthy dissenting opinion raised a number of points and theoretical matters which had never been briefed or argued by any of the parties, or presented to either the trial or Supreme Court on the appeal (A-8). Included in the dissent was Justice DeBruler's opinion that the strike by Petitioner's members was "completely peaceful" (A-9), and that a blanket prohibition of strikes by public employees might violate the equal protection clause of the 14th Amendment. (A-13).

After the court's judgment of October 1, 1969, Petitioner filed its petition for rehearing, and alluded to the dissenting opinion with reference to due process of law and equal protection of law under the 14th Amendment and the Indiana Constitution. Even at this late point in the proceedings, Petitioner offered no authority for this contention. In denying rehearing neither the majority nor dissenting members of the Indiana Supreme Court alluded to these constitutional questions, directly or indirectly.

The lone mention of equal protection in the dissenting opinion of Justice DeBruler in no way indicates that the majority of the Indiana Supreme Court considered this federal question, or that the question was properly raised by petitioner. See Stern and Gressman, *Supreme Court Practice* (4th edition 1969), p. 327. It is the majority ruling which the court must consider, and this court reviews judgments, not opinions. See *Black v. Cutter Laboratories* 351 U.S. 292, 297 (1956); *McLaren vs. Fleischer* 256 U.S. 478 (1921).

This court has held repeatedly that an attempt to raise a federal question after judgment, by a petition for rehearing, does not furnish a basis for review by the U. S. Supreme Court, unless the state court actually entertains

the question and decides it. *Herndon vs. Georgia,* 295 U.S. 441, 445 (1935); *Radio Station WOW vs. Johnson,* 326 U.S. 120 (1945). When the highest state court has failed to pass upon a federal question it will be assumed that such omission was due to one of proper presentation in the state court unless the aggrieved party can show the contrary. *Street vs. New York,* 394 U.S. 576 (1969); *Bailey vs. Anderson,* 326 U.S. 203, 206 (1945).

Petitioner relies on the "surprise" doctrine of *Brinkerhoff-Faris Trust and Savings Co. v. Hill,* 281 U.S. 673 (1930) as its basis for jurisdiction. There this court ruled that a federal question involving the taking of property without due process of law was timely raised to the state court by a petition for rehearing, where the state court decision could not have been anticipated under the prior state law. Here, unlike the facts in *Brinkerhoff,* there were no prior Indiana decisions to mislead petitioner and all of the known authority presented on the questions argued was adverse to petitioner. Furthermore, petitioner knew that new Indiana law would be made by its appeal, that *United States v. United Mine Workers,* 330 U.S. 258 (1947) would probably be controlling, and that it failed to raise constitutional objections at its peril. Clearly, the court's ruling could have been anticipated in this case.

Thus, we submit that petitioner's attempt to raise these federal questions in its petition for rehearing, after the judgment of the Indiana court, was improper. *Hulbert v. Chicago,* 202 U.S. 275 (1906). See also *Cardinale v. Louisiana,* 394 U.S. 437, 439 (1969) *John v. Paulin,* 231 U.S. 583 (1914).

Furthermore, under Indiana practice, constitutional questions may not be raised for the first time by petition for rehearing. *City of Indianapolis v. Wynn,* 239 Ind. 567, 157

N.E. 2d 828, rehearing denied 159 N.E. 2d 572 (1959); *Gardner v. City of Bluffton* 173 Ind. 454, 90 N.E. 898 (1910). In Indiana, as in most states, petitions for rehearing may not raise new issues or constitutional questions not previously briefed or argued. *Kilgallen v. State,* 192 Ind. 531, 137 N.E. 178 (1922); *Harden v. State,* 246 Ind. 23, 201 N.E.2d 333, rehearing denied 202 N.E.2d 164 (1964).

Petitioner's failure to follow Indiana procedures in raising these constitutional questions precludes review by this court on these questions. *Ferguson v. Georgia,* 365 U.S. 570, 572 (1961). No amount of verbiage can hide the fact that the constitutional questions here sought to be raised by petitioner were never presented to the Indiana Supreme Court. A reading of the court's judgment and its opinion denying rehearing clearly indicates that it never considered these federal questions. Under all authority which respondents can find, this court should deny this petition for lack of jurisdiction.

2. The Indiana judgment was correct and is not in conflict with any other decisions.

Petitioner admits that no state or federal statute is being challenged here. Rather it attacks the Indiana judgment, based on the common law, that public employees do not have the right to strike. Yet petitioner offers no authority for its position, nor did it do so in its arguments to the Indiana Supreme Court. Respondents submit that there is no authority available to support the position of petitioner, and that all known authorities support the Indiana Supreme Court decision. Clearly, there is no conflict here with any decisions from other jurisdictions where these questions have been decided.

It has long been held, that under the common law, public employees had no right to strike. *Cleveland vs. Division 268 of Amalgamated Association,* 41 Ohio Op. 236, 90 N.E. 2d 711 (1949); *Board of Education v. New Jersey Education Association,* N. J. Sup., 247 A. 2d 867 (1968). This court has held that neither the Fourteenth Amendment nor the common law confers the absolute right to strike. *Dorchy vs. State of Kansas,* 272 U.S. 306, 311 (1926). States in governing their internal affairs may, consistent with the Fourteenth Amendment prohibit any strike or peaceful picketing if the prohibition is reasonably calculated to achieve a valid state policy. *International Brotherhood of Teamsters vs. Vogt,* 354 U. S. 284, reh. den. 354 U.S. 945 (1957). And, it is immaterial if this public policy has been expressed by the judiciary rather than the legislature. *Hughes vs. Superior Court of California,* 339 U.S. 460, 466 (1950). A state may prohibit all picketing if the state determines that picketing violates its public policy. *International Brotherhood of Teamsters v. Hanke,* 339 U. S. 470 (1950).

Even more explicitly, state courts have universally held that denying public employees the right to strike in no way denies them either due process of law or equal protection as defined by the Fourteenth Amendment. *In Re Block* 50 N.J. 494, 236 A.2d 589 (1967); *City of Manchester vs. Manchester Teachers Guild,* 100 N.H. 507, 131 A. 2d 59 (1957); *City of Detroit vs. Division 26 of Amalgamated Assoc., et al,* 51 N.W. 2d 228, 322 Mich. 237, appeal dismissed 344 U.S. 805, reh. den. 344 U.S. 882 (1952); *Minneapolis Fed. of Teachers vs. Obermeyer,* 147 N.W.2d 358, 275 Minn. 347 (1966).

Recent New York cases have affirmed the general rule that laws prohibiting strike by public employees do not

violate the equal protection or due process clauses of the Fourteenth Amendment, it being recognized that the Fourteenth Amendment permits states a wide scope of discretion in evaluating laws which affect some groups of citizens differently than others. *City of New York vs. DeLury*, 243 N.E.2d 128, 23 N.Y. 2d 175, 295 NYS 2d 901, application denied, 244 N.E. 2d 472, 23 N.Y. 2d 766, 296 N.Y.S. 2d 958; appeal dismissed 394 U.S. 455 (1968); *Rankin vs. Shanker*, 242 N.E.2d 802, 23 N.Y.2d 111 (1968); *State v. Fuller*, 296 N.Y.S. 2d 37, 31 A.D. 2d 71 (1968).

Actually, had petitioners properly raised these Fourteenth Amendment arguments, respondents could have replied by citing such cases as *Rodriguez vs. Sklar* (D.C. N.Y. 1968) 293 F. Supp. 1013, where the court stated that a district superintendent who closed down a school in support of an unlawful teachers strike, would be denying those children seeking to attend that school of equal protection of the laws, since those children would be treated differently from children in other parts of the state where schools were open. Respondents submit that the school children are entitled to equal protection, too.

Respondents object to petitioner's characterization of the strike as "completely peaceful" and not "substantially" disruptive of the continuance of the Anderson Public Schools. The evidence was to the contrary and clearly indicated that the strike was directly affecting the safety and welfare of the 17,000 school children in the system. The trial court found that an emergency existed requiring the issuance of a restraining order and the Indiana Supreme Court also noted that the pupils' safety was being jeopardized. (A-2) Petitioner never raised these objections or distinctions to the trial court below, or to the Indiana Supreme Court prior to its judgment. In fact, petitioner introduced no evidence at all at the contempt hearing. It is

now both fatally late and improper to raise this factual matter to this court. See Stern and Gressman, supra, p. 172.

While petitioner argues that this court should now consider whether there is a rational basis, consistent with the Fourteenth Amendment, for distinguishing between private and public employees it wholly failed to raise this question to the Indiana Supreme Court. If the decision of the Indiana Supreme Court was not sufficiently "discriminating" to suit petitioner (B-9), Petitioner surely did little to assist the court in its determination. Even now they offer no authority in support of this view. *Ellis v. Dixon*, 349 U.S. 458, 460 (1955). The authority is again to the contrary. See *City of New York v. DeLury*, supra, 243 N.E. 2d at 133. The examples cited by petitioner are neither persuasive nor correct.[1]

Respondents agree with petitioners that "intelligent and sophisticated" legislation is needed for this difficult subject. However, we believe the state legislature should first act in this area, possibly obviating the need for further court action. From all of the authority cited herein and by the Indiana Supreme Court (A. 3-7), it would appear that no public employee anti-strike legislation, state or federal, has ever been declared unconstitutional. We submit that it is presumptuous for petitioner now to ask this court to provide guidelines for the Indiana legislature on this subject.

Thus, under all known authority, the Indiana judgment is correct and no valid authority to the contrary has been

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[1] The example on page 11, comparing Anderson's municipal utility employees to those of a private utility incorrectly states the Anderson gas utility is publicly owned. It is not. Also, the statute cited in note 5 does not apply to Anderson, but only to the City of Indianapolis.

offered by petitioner. Clearly, there is no need for this court to concern itself with the questions concerning due process and equal protection since there exists no conflict in the reported decisions.

3. Finally, petitioner argues (B. 11-13) that this court should "review and clarify" its landmark decision, *United States vs. United Mine Workers*, 330 U.S. 258 (1947). Respondents would point out to the court that this is the very first time in this entire litigation that petitioner has ever mentioned this case. It never sought at trial, on appeal, or in rehearing, to apprise the Indiana courts of its interpretation of, and views on, this case. Indeed, throughout this proceeding petitioner has acted as if it did not exist. Surely, it is too late now for petitioner to request that this court review the scope of this case, which has served as *the* basic authority concerning the applicability of the Norris-LaGuardia Act and its carbon copy state offspring to disputes involving public employees.

For this court to now restrict or modify the meaning of *United Mine Workers*, on the basis of the limited facts presented by this case, could only produce chaos in a body of settled federal and state decisions, casting doubt as to the validity of all existing and anticipated public employee legislation. In this troublesome area, further complications are not needed. *United States vs. United Mine Workers* needs no modification by this court. What is needed, respondents submit, is thoughtful legislation to fairly protect the rights of both public employees and the general public who support them with their tax dollars. This is a matter beyond the scope of this court and this petition.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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